Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services	)	
	)	
Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations	)	
	)	
Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers	)	WT Docket No. 98-100
	)	
Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers	)	GN Docket No. 94-33
	)	
GTE Petition for Reconsideration or Waiver of a Declaratory Ruling	)	MSD-92-14
	)	

MEMORANDUM OPINION AND ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: June 23, 1998 **Released: July 2, 1998**

Comment Date: August 3, 1998
Reply Comment Date: August 18, 1998
Comments and Reply Comments to be filed in WT Docket No. 98-100

By the Commission: Chairman Kennard issuing a separate statement; Chairman Kennard and Commissioners Ness and Tristani issuing a joint statement; Commissioner Furchtgott-Roth dissenting and issuing a separate statement; Commissioner Powell dissenting in part and issuing a separate statement.

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I. INTRODUCTION

1. On May 22, 1997, the Broadband Personal Communications Services Alliance of the Personal Communications Industry Association (PCIA) filed a petition requesting forbearance from the continued application of sections 201, 202, 214, 226,[1] and 310(d) of the Communications Act of 1934, as amended (the Act), to broadband Personal Communications Services (broadband PCS) carriers.[2] PCIA also requests forbearance from continued application of the resale obligations of 47 C.F.R. section 20.12(b) to broadband PCS carriers.[3] In February 1998, the staff designated the PCIA Petition as one of the initiatives to be considered as part of the 1998 biennial review of regulations pursuant to

[1] Section 226 is also referred to as Telephone Operator Consumer Services Improvement Act (TOCSIA).

[2] Petition for Forbearance filed by Broadband Personal Communications Services Alliance of the Personal Communications Industry Association (May 22, 1997) (PCIA Petition or Petition).

[3] *Id.* at 27.

section 11 of the Act.[4] In addition to those proceedings proposed to be initiated as part of the 1998 biennial regulatory review, the Commission has numerous ongoing proceedings that are consistent with the deregulatory and streamlining policy embodied in section 11.

2. The Commission granted in part that portion of the PCIA Petition relating to forbearance from enforcing section 310(d) of the Act in an Order released on February 4, 1998.[5] In the *FCBA Order*, we determined that the record established sufficient justification to forbear from enforcing the requirements of section 310(d) as they apply to *pro forma* assignments of licenses and transfers of control of all wireless telecommunications licensees, and that such forbearance enhances competition and serves the public interest.[6] For the reasons discussed below, we deny in part and grant in part the remaining portions of PCIA's Petition for Forbearance. Although we determine in this Order that the remaining portions of PCIA's Petition for Forbearance shall be denied in part, we emphasize our commitment to forbear from enforcing provisions of our rules that inhibit or distort competition in the marketplace, represent unnecessary regulatory costs, or stand as obstacles to lower prices, greater service options, and higher quality services for American telecommunications consumers. We welcome future opportunities to extend the Commission's exercise of its forbearance authority in furtherance of these goals and, to that end, adopt as Part V of this item a Notice of Proposed Rulemaking seeking comments on possible forbearance from additional provisions of our rules.

3. In addition, as noted above, this proceeding is part of our 1998 biennial review of regulations pursuant to section 11.[7] Section 11 requires us to review all of our regulations applicable to providers of telecommunications services and determine whether any rule is no longer in the public interest as the result of meaningful economic competition between providers of telecommunications service.[8] As part of our biennial review of regulations required under section 11, we believe it is appropriate to review our regulations to determine which regulations can be streamlined or eliminated in light of increased competition in the wireless telecommunications marketplace. In this proceeding, we are guided by the principles of furthering competition in the telecommunications industry and drafting clear and concise rules that provide for fair, efficient, and consistent regulation of wireless telecommunications services.

II. EXECUTIVE SUMMARY

4. In this Order, we decline to forbear from applying sections 201 and 202 of the Act, the international authorization requirement of section 214 of the Act, and the resale rule of 47 C.F.R.

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[4] 47 U.S.C. § 161.

[5] *See* Federal Communications Bar Association's Petition for Forbearance from section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, *Memorandum Opinion and Order*, 13 FCC Rcd. 6293 (1998) (*FCBA Order*).

[6] *Id.* at 6306, ¶ 23.

[7] 47 U.S.C. § 161.

[8] *See* "1998 Biennial Review of FCC Regulations Begun Early; to be Coordinated by David Solomon," *News Release*, 1997 WL 713692 (Nov. 18, 1997).

section 20.12(b) to broadband PCS providers because the record does not satisfy the three-prong forbearance test set forth in section 10 of the Act. We do, however, grant partial forbearance from the requirement that CMRS providers file tariffs for their international services. We also grant partial forbearance from section 226 for CMRS providers of operator services and aggregators.

5. We also resolve a related proceeding concerning section 226. We deny GTE's Petition for Reconsideration or Waiver of a Declaratory Ruling[9] and affirm the Common Carrier Bureau's decision that TOCSIA applies to certain activities of GTE's mobile affiliates,[10] but grant limited forbearance from certain provisions of TOCSIA as explained herein.

6. Further, we terminate the Notice of Proposed Rulemaking entitled *Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers*[11] because the enhanced forbearance authority we received in the 1996 Telecommunications Act[12] renders much of the record in that proceeding no longer relevant. We issue a Notice of Proposed Rulemaking seeking new comments regarding forbearance from regulation in wireless telecommunications markets that is responsive to current statutory standards and market conditions.

III. BACKGROUND

7. The Commission derives its authority to forbear from applying regulations or provisions of the Act from sections 332(c)(1)(A)[13] and 10 of the Act.[14] Section 332(c)(1)(A) provides the Commission with the authority to forbear from enforcing most Title II obligations, but only as to providers of commercial mobile radio service (CMRS). Section 10 provides the Commission with authority to forbear from the application of virtually any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or a class of carriers or services.[15]

8. The CMRS marketplace in which broadband PCS providers compete is substantially less regulated and more competitive than most telecommunications markets. In 1993, Congress forbade state and local governments from regulating the entry of CMRS providers or the rates charged for

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[9] Petition for Reconsideration or Waiver, MSD-92-14 (filed Sep. 27, 1993) (*GTE Reconsideration Petition*).

[10] Petition for a Declaratory Ruling that GTE Airfone, GTE Railfone, and GTE Mobilnet are Not Subject to the Telephone Operator Consumer Services Improvement Act of 1990, *Declaratory Ruling*, 8 FCC Rcd. 6171 (Comm. Carr. Bur. 1993) *(GTE Declaratory Ruling), recon. pending.*

[11] Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, *Notice of Proposed Rule Making*, 9 FCC Rcd. 2164 (1994) (*Further Forbearance NPRM*).

[12] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151 *et seq.*) ("1996 Act"). The 1996 Act amended the Communications Act of 1934.

[13] 47 U.S.C. § 332(c)(1)(A).

[14] 47 U.S.C. § 160(a)(1-3).

[15] *Id.* The Commission may not forbear from applying the requirements of sections 251(c) or 271 until it determines that those requirements have been fully implemented. 47 U.S.C. § 160(d).

CMRS, unless a state successfully petitioned for authority to regulate CMRS rates by showing that market conditions fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory, or that such market conditions exist and a CMRS offering is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within that state.[16] The following year, the Commission forbore under section 332(c)(1)(A) from requiring CMRS providers to comply with the tariff filing obligations of section 203, the domestic market entry and market exit requirements of section 214, and several other provisions of Title II.[17] The Commission also denied the petitions of several states for authority to regulate rates under section 332(c)(3).[18] Taken together, these actions have substantially relieved CMRS providers from the most burdensome aspects of common carrier regulation. We believe these deregulatory actions have contributed significantly to the impressive growth of competition in CMRS markets. As we have recently found, substantial progress has been made towards a truly competitive mobile telephone marketplace, resulting in lower prices and more attractive service offerings for consumers.[19]

9. The Commission has also considered forbearance from enforcing other Title II regulations with respect to CMRS carriers on several occasions and in several contexts. In 1993, the Common Carrier Bureau denied a Petition for Declaratory Ruling filed by GTE that sought a ruling that TOCSIA did not apply to certain activities of GTE's mobile affiliates.[20] In the *CMRS Second Report and Order*, the Commission determined that, although it would forbear from enforcing several provisions of Title II against CMRS providers, forbearance with respect to certain other provisions was not then in the public interest.[21] In the *Further Forbearance NPRM* issued later that year, the Commission sought comment on whether it should forbear from applying sections 210, 213, 215, 218, 219, 220, 223, 225, 226, 227 and 228 to particular classes of CMRS providers.[22]

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[16] 47 U.S.C. § 332(c)(3).

[17] Implementation of sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd. 1411, 1463-93, ¶¶ 124-219 (1994) (*CMRS Second Report and Order*).

[18] *See, e.g.*, Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, *Report and Order*, 10 FCC Rcd. 7025 (1995) (*Connecticut Rate Regulation Order*), *aff'd sub nom. Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996); Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services, *Report and Order*, 10 FCC Rcd. 7842 (1995) (*Ohio Rate Regulation Order*).

[19] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Third Report*, FCC 98-91, at 2, 13-38 (rel. June 11, 1998) (*Third CMRS Competition Report*); *see also* Separate Statement of Chairman William E. Kennard.

[20] *Declaratory Ruling*, 8 FCC Rcd. 6171. GTE subsequently filed a Petition for Reconsideration or Waiver of this Decision, *GTE Reconsideration Petition*, MSD-92-14, which we deny in this order.

[21] *See CMRS Second Report and Order*, 9 FCC Rcd. at 1463-93, ¶¶ 124-219.

[22] *Further Forbearance NPRM*, 9 FCC Rcd. 2164.

10. The Commission has also had several opportunities to apply section 10 during the two years since the 1996 Act became law. For example, in the earliest exercise of its section 10 authority, the Commission determined to forbear from requiring or allowing nondominant interexchange carriers to file tariffs pursuant to section 203 of the Act for their interstate, domestic, interexchange services.[23] The Commission found that tariffing in this market was not necessary to ensure against unjust and unreasonable or unjustly or unreasonably discriminatory charges or to protect consumers,[24] and that complete detariffing would be in the public interest because it would "enhance competition among providers of [interstate] services, promote competitive market conditions, and achieve other objectives that are in the public interest."[25] For similar reasons, the Commission has forborne from requiring providers of interstate exchange access services other than incumbent local exchange carriers (LECs) to file tariffs.[26] The Commission has, however, declined to forbear from requiring nondominant providers of interexchange operator services to file informational tariffs under section 226 because, given that it continued to receive thousands of complaints annually about charges for these services, the Commission concluded that its continued monitoring of these providers' rates pursuant to tariffs would protect consumers.[27] The Commission has also declined to forbear from applying its part 36 jurisdictional separations rules to incumbent LECs subject to its price cap rules, reasoning that forbearance alone would not satisfy the section 10 criteria and that replacing the separations rules with a different apportionment regime, as the petitioner requested, was appropriately addressed in a rulemaking proceeding.[28] As discussed above, in the *FCBA Order* we forbore, with some exceptions, from applying the requirements of section 310(d) to *pro forma* assignments of licenses and transfers of control of wireless telecommunications licensees.[29] Most recently, the Commission has declined to forbear from applying its dominant carrier regulations and rate of return requirements to Comsat

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[23] Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order*, 11 FCC Rcd. 20730 (1996) (*IXC Forbearance Order*), *stayed pending review sub nom, MCI Telecommunications Corp. v. FCC*, Case No. 96-1459 (D.C. Cir., Feb. 19, 1997), *order on recon.*, 12 FCC Rcd. 15014 (1997).

[24] *Id.* at 20739-53, ¶¶ 16-43.

[25] *Id.* at 20760, ¶ 52.

[26] Hyperion Telecommunications, Inc., Petition Requesting Forbearance, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd. 8596 (1997) (*CAP Forbearance Order*). We declined, however, to forbear from imposing tariff requirements on "non-dominant telecommunications carriers in general" on the ground that the record did not address forbearance for this class of carriers with specificity. *Id.* at 8607, ¶ 21. We also did not adopt complete detariffing in this order because no notice had been given of that option. *Id.* at 8607-08, ¶ 22. However, we issued a notice of proposed rulemaking in which we proposed complete detariffing. *Id.* at 8613, ¶¶ 33-34.

[27] Billed Party Preference for InterLATA 0+ Calls, *Second Report and Order on Reconsideration*, 13 FCC Rcd. 6122, 6146-47, ¶ 43 (1998) (*Billed Party Preference Order*), *recon. pending.*

[28] New England Telephone and Telegraph Company and New York Telephone Company Petition for Forbearance From Jurisdictional Separations Rules, *Order*, 12 FCC Rcd. 2308 (1997).

[29] *FCBA Order*, 13 FCC Rcd. 6293.

Corporation in those markets where it remains a dominant carrier, but proposed to replace rate of return regulation with an alternative method of dominant carrier regulation.[30]

11. PCIA now requests that, pursuant to section 10 of the Act, we forbear, with respect to all broadband PCS licensees, from enforcing the following provisions: sections 201 and 202 of the Act (carriers must furnish services upon reasonable request, carriers must establish physical connections with other carriers in accordance with orders of the Commission, and carriers' rates and practices must be just, reasonable, and non-discriminatory), section 214 of the Act (carriers must obtain Commission authorization to provide international telecommunications services),[31] section 226 of the Act (operator service providers and aggregators,[32] with respect to public phones, must comply with certain requirements), and section 20.12(b) of our rules (certain CMRS carriers must not unreasonably restrict the resale of telecommunications services).[33] PCIA argues that forbearance from enforcement of these provisions is warranted under the three-pronged test of section 10 of the Act.[34]

12. Under section 10, we must forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets if a three-pronged test is met. Specifically, section 10 requires forbearance, notwithstanding section 332(c)(1)(A), if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

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[30] Comsat Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, File No. 60-SAT-ISP-97, *Order and Notice of Proposed Rulemaking*, FCC 98-78, ¶¶ 135-163 (rel. Apr. 28, 1998). In addition to the orders discussed in the text, we have incidentally applied section 10 in several other proceedings. Furthermore, Commission staff has applied section 10 pursuant to delegated authority in several instances. *See, e.g.,* Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, *Memorandum Opinion and Order*, 13 FCC Rcd. 2627 (Comm. Carr. Bur. 1998); Petition for Forbearance From Application of the Communications Act of 1934, as Amended, to Previously Authorized Services, *Memorandum Opinion and Order,* 12 FCC Rcd. 8408 (Comm. Carr. Bur. 1997).

[31] PCIA also requests that we forbear from applying to broadband PCS licensees the section 203 requirement to file tariffs for international services.

[32] These terms are defined in para. 66, *infra.*

[33] PCIA's additional request for forbearance from section 310(d) was consolidated with a similar request for forbearance filed by the Federal Communications Bar Association, and, as previously noted, was granted in the *FCBA Order*, 13 FCC Rcd. 6293.

[34] 47 U.S.C. § 160(a).

(3) forbearance from applying such provision or regulation is consistent with the public interest.[35]

13. On June 2, 1997, the Wireless Telecommunications Bureau issued a public notice seeking comment on the Petition.[36] Twenty-two parties filed comments on the Petition and thirteen parties filed reply comments.[37] On May 21, 1998, we extended until June 8, 1998, the date on which the Petition would be deemed granted in the absence of a decision that it failed to meet the standards for forbearance under section 10(a).[38] On June 5, 1998, we further extended this deadline until June 23, 1998.[39]

IV. DISCUSSION

A. Sections 201 and 202

14. Background. Section 201 of the Act mandates that carriers engaged in the provision of interstate or foreign communication service provide service upon reasonable request, and that all charges, practices, classifications, and regulations for such service be just and reasonable. Section 201 also empowers the Commission to require physical connections with other carriers, to establish through routes, and to determine appropriate charges for such actions.[40] Section 202 states that it is unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services, or to make or give any undue or unreasonable preference or advantage to any person or class of persons.[41] Section 332 of the Act requires that the

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[35] *Id.*

[36] Wireless Telecommunications Bureau Seeks Public Comment On Petition For Forbearance Filed by Broadband Personal Communications Services Alliance of the Personal Communications Industry Association, *Public Notice*, 12 FCC Rcd. 7637 (1997).

[37] *See* Appendix B for a complete list of commenters and short-form citations used. Unless otherwise indicated, citations are to comments on the PCIA Petition. *See also* Letter from Pamela J. Riley, AirTouch Communications, to Magalie R. Salas, Secretary, Federal Communications Commission, dated March 24, 1998; Response of PCIA to Staff Questions Regarding TOCSIA from Jeffrey S. Linder, Counsel, PCIA, to Magalie Salas, Secretary, Federal Communications Commission, dated April 10, 1998 (PCIA *Ex Parte*); Letter from Michael F. Altschul, Vice President and General Counsel, CTIA, to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, dated May 1, 1998 (CTIA *Ex Parte*).

[38] Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, *Order*, FCC 98-99 (rel. May 21, 1998). *See* 47 U.S.C. § 160(c) (petition for forbearance under section 10(a) shall be deemed granted if not denied within one year after the Commission receives it, unless the Commission extends the one-year period by an additional 90 days upon finding that an extension is necessary to meet the requirements of section 10(a)).

[39] Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, *Order*, FCC 98-113 (rel. June 5, 1998).

[40] 47 U.S.C. § 201.

[41] 47 U.S.C. § 202.

Commission treat all CMRS providers as common carriers for purposes of the Communications Act, except to the extent the Commission determines to forbear from applying certain provisions of Title II. Although section 10 forbearance contains no such restriction, it is notable that, for purposes of forbearance under section 332, the Commission "may not specify any provision of section 201, 202, or 208." PCIA requests section 10 forbearance from the application of sections 201 and 202 of the Act to broadband PCS providers on the ground that market forces, including the competitive presence of other CMRS providers, are sufficient to ensure that rates are just, reasonable and not unjustly discriminatory.[42] PCIA states that forbearance will promote the public interest by enhancing competition, providing consumers with increased choices, driving prices downward, and eliminating compliance costs.[43]

15. Discussion. Sections 201 and 202, codifying the bedrock consumer protection obligations of a common carrier, have represented the core concepts of federal common carrier regulation dating back over a hundred years. Although these provisions were enacted in a context in which virtually all telecommunications services were provided by monopolists, they have remained in the law over two decades during which numerous common carriers have provided service on a competitive basis. These sections set out broad standards of conduct, requiring the provision of interstate service upon reasonable request, pursuant to charges and practices which are just and reasonable and not unjustly discriminatory. At bottom, these provisions prohibit unreasonable discrimination by common carriers by guaranteeing consumers the basic ability to obtain telecommunications service on no less favorable terms than other similarly situated customers. The Commission gives the standards meaning by defining practices that run afoul of carriers' obligations, either by rulemaking or by case-by-case adjudication. The existence of the broad obligations, however, is what gives the Commission the power to protect consumers by defining forbidden practices and enforcing compliance. Thus, sections 201 and 202 lie at the heart of consumer protection under the Act. Congress recognized the core nature of sections 201 and 202 when it excluded them from the scope of the Commission's forbearance authority under section 332(c)(1)(A).[44] Although section 10 now gives the Commission the authority to forbear from enforcing sections 201 and 202 if certain conditions are satisfied, the history of the forbearance provisions confirms that this would be a particularly momentous step.[45]

16. Sections 201 and 202 are enforced through the formal complaint process established in section 208 of the Act.[46] Under section 208, any aggrieved party may file a petition with the Commission complaining of an alleged violation of these provisions. The carrier that is the subject of the complaint must then either rectify the alleged violation or respond to the complaint. The carrier is

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[42] PCIA Petition at 23.

[43] *Id.* at 26.

[44] *See* 47 U.S.C. § 332(c)(1)(A).

[45] *See also CMRS Second Report and Order*, 9 FCC Rcd. at 1461, ¶ 120 (stating that classification of PCS as presumptively CMRS, thus making it subject to section 201 and 202 and the complaint procedures in section 208, would contribute to the universal availability of PCS because such regulations place an obligation on PCS licensees to make their services available to the public at non-discriminatory prices).

[46] 47 U.S.C. § 208.

relieved of liability for any injury if, within a reasonable period specified by the Commission, the carrier rectifies the injury alleged to have been caused. If the carrier does not satisfy the complaint within the specified time or if there appears to be any reasonable ground for investigating the complaint, the Commission shall investigate the alleged violation.[47] Consumers and carriers are protected by this complaint process. Indeed, when we decided to forbear from applying tariff requirements to CMRS, we relied on sections 201 and 202 and the section 208 complaint process as important safeguards to protect consumers in the event of market failure.[48]

17. Consistent with the centrality of sections 201 and 202 to consumer protection, the Commission has never previously refrained from enforcing sections 201 and 202 against common carriers, even when competition exists in a market.[49] In those instances where the Commission has reclassified carriers as "non-dominant" because they lack market power, and reduced those carriers' regulatory burdens, the Commission has continued to require compliance with sections 201 and 202.[50] For example, we concluded in the *AT&T Reclassification Order* that the prohibitions against unjust and unreasonable rates, practices, and discrimination contained in sections 201 and 202 of the Act apply equally to dominant and non-dominant carriers.[51] We explained that in the absence of section 205 tariff regulation, the substantive obligations imposed under sections 201 and 202, coupled with the complaint and enforcement processes of section 208, would prevent AT&T from engaging in anticompetitive behavior such as prohibition or unreasonable restriction of resale.[52]

18. Based on the record before us, we decline to forbear from enforcing the core common carrier obligations of sections 201 and 202 at this time. The record does not show, as required for forbearance under section 10, that the current market conditions ensure that the charges, practices, classifications and regulations of broadband PCS carriers are just and reasonable and are not unjustly or unreasonably discriminatory, that market forces are sufficient to protect consumers from discriminatory charges and practices of broadband PCS providers, and that forbearance is in the public interest.

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[47] 47 U.S.C. § 208(a). Congress imposed a five month deadline for resolving any section 208 investigation initiated by the Commission, which we believe is indicative of the importance Congress placed on the complaint process even in a largely de-regulated regime. *See* 47 U.S.C. § 208(b)(1).

[48] *See CMRS Second Report and Order*, 9 FCC Rcd. at 1478-79, ¶¶ 175-176; *see also IXC Forbearance Order*, 11 FCC Rcd. at 20743, 20751, ¶¶ 21, 38 (citing continued applicability of sections 201 and 202 and complaint process in support of forbearance from tariffing interstate, domestic, interexchange services); *CAP Forbearance Order*, 12 FCC Rcd. at 8609, ¶ 25 (similar discussion in context of provision of interstate exchange access services by providers other than incumbent LECs).

[49] *See* BANM Comments at 18.

[50] *Id.* (citing Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *First Report and Order*, 85 FCC 2d 1(1980); Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd. 3271 (1995) (*AT&T Reclassification Order*)).

[51] *AT&T Reclassification Order*, 11 FCC Rcd. at 3282, ¶ 130.

[52] *Id.*

19. The first prong of the section 10 forbearance standard is not satisfied unless enforcement of a statutory provision is shown not to be necessary to ensure that charges, practices, classifications, and regulations are just and reasonable, and are not unjustly or unreasonably discriminatory.[53] This standard essentially tracks the central requirements of sections 201 and 202. Thus, in arguing for forbearance from applying sections 201 and 202, PCIA necessarily contends that in order to ensure that broadband PCS providers' charges, practices, classifications, and regulations are just, reasonable, and not unjustly or unreasonably discriminatory, we need not require that those charges, practices, classifications, and regulations be just, reasonable, and not unjustly or unreasonably discriminatory.

20. PCIA argues that the broadband PCS market is competitive within the context of the total CMRS market, that broadband PCS providers lack individual market power, and that, therefore, enforcement of sections 201 and 202 is no longer necessary to ensure that rates and practices associated with broadband PCS, or imposed by broadband PCS providers, are just, reasonable, and not unjustly discriminatory.[54] PCIA relies heavily on the contention that Congress enacted sections 201 and 202 when the communications marketplace was dominated by a few large landline common carriers with substantial market power, and that today's vigorously competitive CMRS market has rendered these regulations superfluous.[55] PCIA argues that competition in the marketplace can appropriately regulate the provision of wireless telecommunications services by broadband PCS providers and that the present level of competition can supplant sections 201 and 202.

21. We agree with PCIA that broadband PCS providers are operating in an increasingly competitive environment. Until a few years ago, licensed cellular providers enjoyed duopoly market power, substantially free of direct competition from any other source. As early as 1994, we cited growing CMRS competition as a consideration supporting forbearance from imposing tariff obligations upon CMRS providers.[56] Growing competition was also the basis for denying state petitions for authority to regulate CMRS rates under section 332(c)(3) of the Act.[57] Just prior to the filing of PCIA's Petition, the Commission issued its *Second CMRS Competition Report*, in which we acknowledged that the most significant recent entry into CMRS markets has been by PCS providers.[58]

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[53] 47 U.S.C. § 160(a)(1).

[54] PCIA Petition at 10-26.

[55] *Id.* at 19. In support of its contention that CMRS markets are so competitive that sections 201 and 202 are no longer necessary, PCIA relies on the Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Second Report*, 12 FCC Rcd. 11266 (1997) (*Second CMRS Competition Report*). In particular, PCIA cites findings in the *Second CMRS Competition Report* regarding CMRS market growth, capital investment, the existence of multiple CMRS providers in each market area, and the trend of CMRS providers offering lower prices and new, innovative services. *See* PCIA Petition at 9-16 (citing *Second CMRS Competition Report*, 12 FCC Rcd. 11266).

[56] *CMRS Second Report and Order*, 9 FCC Rcd. at 1478, ¶ 175; *see generally id.* at 1467-72, ¶¶ 135-154 (discussing state of competition).

[57] *See, e.g., Connecticut Rate Regulation Order*, 10 FCC Rcd. at 7055-59, ¶¶ 67-77; *Ohio Rate Regulation Order*, 10 FCC Rcd. at 7851-52, ¶¶ 37-39.

[58] *Second CMRS Competition Report*, 12 FCC Rcd. at 11269.

We further observed that the prospective entry of PCS carriers appeared to be accelerating the conversion of some cellular systems from analog to digital technology, a change that would facilitate the offering of a broader array of wireless services by cellular licensees.[59] Most recently, we have adopted a *Third CMRS Competition Report* in which we observed that the CMRS marketplace has continued to progress toward competition during the past year, with the result that prices for mobile telephony service have been falling and service offerings have become more diverse.[60]

22. Nonetheless, the competitive development of the industry in which broadband PCS providers operate is not yet complete and continues to require monitoring.[61] The most recent evidence indicates that prices for mobile telephone service have been falling, especially in geographic markets where broadband PCS has been launched.[62] These price declines, however, have been uneven,[63] and do not necessarily indicate that prices have reached the levels they would ultimately attain in a competitive marketplace. In general, licensees do not exert any disciplinary effect in their markets until after they announce their intentions to commence operations, identify the services they intend to offer, and begin soliciting business.[64] While six broadband PCS licenses have now been awarded in most areas, many licensees have yet to begin offering services. Most C, D, E, and F block licensees are not yet in operation, and in some areas, even A or B block licensees have not yet launched services.[65] Furthermore, even if a licensee is providing service in part of its licensed service area, there may be large areas left without competitive service.[66]

23. Assuming all relevant product and geographic markets become substantially competitive, moreover, carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner. Competitive markets increase the number of service options available to consumers, but they do not necessarily protect all consumers from all unfair practices. The market may fail to deter providers from unreasonably denying service to, or discriminating against, customers whom they may view as less desirable. In addition, certain conditions even in competitive CMRS

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[59] *Id.* at 11269-70.

[60] *See Third CMRS Competition Report* at 2.

[61] *See id.* at 33-35 (discussing factors that have the potential to limit broadband PCS growth and competitive development).

[62] *See id.* at 19-20.

[63] *See id.* at 20.

[64] *See* Satellite Business Systems, *Memorandum Opinion, Order, Authorization and Certification,* 62 FCC 2d 997, 1088-1094 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72, 100-102 (D.C. Cir. 1980); General Telephone and Electronics Corporation, *Memorandum Opinion and Order,* 72 FCC 2d 111, 155-158, *order on recon.*, 72 FCC 2d 516, *further recon. denied*, 84 FCC 2d 18 (1979).

[65] *See Third CMRS Competition Report* at 32-33.

[66] The record does not contain a market analysis of competition within particular geographic markets with respect to any of the requests for forbearance made by PCIA. We also note that the *Third CMRS Competition Report* does not contain any such analysis. *See id.* at 18 n.88.

markets could facilitate discrimination and unfair practices. For example, CMRS systems use a variety of different technologies and operate over different frequency bands, thus requiring handsets with different capabilities to access different systems. The cost of a new handset--as a component of the cost of switching providers--may thus act to undermine market discipline. This may be exacerbated by the current lack of number portability. Due to these conditions, providers may, in the absence of sections 201 and 202, have the opportunity and incentive to treat some of their existing customers in an unjust, unreasonable, and discriminatory manner, as compared with similarly situated potential new customers.[67]

24. Given the ongoing competitive development of the markets in which broadband PCS providers operate, constraints on market entry imposed by the need for spectrum licenses, and uncertainties regarding the extent to which a competitive market structure can ensure reasonable and nondiscriminatory practices toward all consumers, we are unwilling to assume that current market conditions alone will adequately constrain unjust and unreasonable or unjustly and unreasonably discriminatory rates and practices without specific evidence to that effect. Neither PCIA nor any other source has brought such evidence to our attention. We therefore conclude that the first prong of the section 10 forbearance standard has not been satisfied.

25. Under the second prong of the section 10 forbearance standard, a party seeking forbearance must show that enforcement of a provision is not necessary for the protection of consumers.[68] PCIA asserts that the variety of competitive alternatives available to consumers, along with the broad range of pricing plans from which they may choose, renders the continued application of sections 201 and 202 to broadband PCS providers unnecessary for consumers' protection.[69] We recognize that consumers in today's market may have a broad choice of calling plans, and that many consumers are able to choose to take service from among several providers. Nonetheless, as we found in connection with the first prong of the section 10 forbearance standard, the record does not show that today's market conditions eliminate all remaining concerns about whether broadband PCS providers' rates and practices are just, reasonable, and non-discriminatory. For the same reasons, we cannot conclude that sections 201 and 202 are not necessary to protect consumers.

26. Many of the unjust or unreasonable practices in which carriers could engage could potentially harm consumers. Sections 201 and 202 serve to deter providers that otherwise may arbitrarily refuse service to, or discriminate against, some potential customers. In addition, as noted above, carriers' use of different technologies, the high cost of handsets, and the current lack of number portability combine to create conditions that could facilitate anti-consumer practices. By raising the costs of changing providers for many consumers, these factors might permit carriers to harm customers who are "locked in" to their provider by failing to offer those customers reasonable deals.[70] Furthermore, carriers could harm consumers by unreasonably failing to offer roaming. Carriers might also prohibit or unreasonably restrict resale of their services, thereby harming consumers by restricting

[67] *See* NWRA Comments at 28.

[68] 47 U.S.C. § 160(a)(2).

[69] PCIA Petition at 22-23.

[70] NWRA Comments at 28.

potential competition by resellers.[71] In the absence of assurance that current market conditions will prevent such carrier practices, we believe that sections 201 and 202, and the complaint process of section 208, constitute a vital safeguard for consumers.

27. The third prong of the section 10 forbearance standard requires us to forbear only if we find that forbearance is consistent with the public interest.[72] In evaluating whether forbearance is consistent with the public interest, we must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers.[73] In making this assessment, we may consider the benefits a regulation bestows upon the public, along with any potential detrimental effects or costs of enforcing a provision. PCIA argues that forbearance from applying sections 201 and 202 to broadband PCS providers would further the public interest because these sections limit carriers' ability to develop specialized offerings for particular customers, and impose administrative costs on carriers.[74] Thus, PCIA contends, sections 201 and 202 retard competition and ultimately harm consumers.

28. We reject PCIA's argument for several reasons. First, as already discussed, the first two prongs of the section 10 forbearance standard are not satisfied because the record does not show that present market conditions, in the absence of sections 201 and 202, will protect consumers and ensure that carriers' rates and practices are just, reasonable, and non-discriminatory. Thus, even if we believed forbearance were in the public interest as required under the third prong, we could not forbear from enforcing sections 201 and 202 pursuant to section 10. We also believe that the benefits sections 201 and 202 confer upon the public by protecting consumers and preventing unjust, unreasonable, and discriminatory practices are important parts of our public interest analysis. Indeed, we believe that as customers begin to rely on CMRS as a partial or complete substitute for wireline service,[75] it becomes increasingly important for us to preserve the basic relationship between carriers and customers enshrined in sections 201 and 202.

29. Moreover, we are not convinced that any harm caused by sections 201 and 202, to competition or otherwise, outweighs the public interest benefits of these provisions. As discussed above, we are committed to forbearing from enforcing requirements that impede competition, impose unnecessary costs, or obstruct the provision of diverse, high quality services at low prices. Nonetheless, we are not convinced by PCIA's generalized claims that sections 201 and 202 substantially restrict broadband PCS carriers' ability to develop specialized offerings and competitive prices. To the contrary, the principal regulatory impediments to carrier innovation -- federal and state regulation of rates and state regulation of entry -- have already been removed as applied to CMRS

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[71] *See* NWRA Comments at 28-29; *see also* America One Comments at 2-3.

[72] 47 U.S.C. § 160(a)(3).

[73] *See* 47 U.S.C. § 160(b).

[74] PCIA Petition at 24-26.

[75] *See Third CMRS Competition Report* at 26-28.

providers by Congressional and Commission action.[76] Rather, sections 201 and 202 give wireless carriers ample discretion to adopt flexible pricing to meet customer needs and marketplace demands. For example, we note that section 202 does not prohibit all different treatment of consumers, only *unreasonable* discrimination among consumers.[77] Furthermore, we disagree that enforcement of sections 201 and 202 puts carriers in the position of speculating about the legal ramifications of offering innovative service packages and prices, and that such speculation chills innovative services and plans.[78] By now, there is a substantial body of precedent that promotional programs, volume discounts and other arrangements may be reasonable and non-discriminatory.[79] We note no party adduces specific evidence that carriers have been deterred from offering particular plans or have been subject to unwarranted complaints. Also, there has been no effort to show the extent of any administrative costs of compliance.[80] We note again that in order to meet the first prong of the section 10 forbearance test, it must be shown that carriers will comply in any event with the central substantive requirements of sections 201 and 202. Under these circumstances, we cannot conclude that the public interest in forbearance outweighs the benefits of continuing to enforce sections 201 and 202.

30. Furthermore, we believe forbearance would harm the public interest, and particularly the growth of competition, in other ways. Forbearance from enforcing sections 201 and 202 with regard to broadband PCS carriers alone would create regulatory asymmetry with respect to cellular and other CMRS providers. This asymmetry would distort competition and contradict the intent of Congress that CMRS providers should be treated similarly.[81] In addition, if we were to forbear from enforcing sections 201 and 202, parties would likely turn to the courts for relief from perceived unjust and

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[76] *See* 47 U.S.C. § 332(c)(3); *CMRS Second Report and Order*, 9 FCC Rcd. at 1463-93, ¶¶ 124-219.

[77] *See, e.g.*, AT&T Communications, Revisions to Tariff F.C.C. No. 12, *Memorandum Opinion and Order*, 4 FCC Rcd. 4932 (1989).

[78] *See* PCIA Petition at 25; *see also* Sprint/APC Comments at 9 (stating that sections 201 and 202 constrain PCS providers from offering imaginative and customized terms and conditions); Nextel Comments at 6-7 (stating that sections 201 and 202 make it difficult for competitive providers to negotiate freely and to tailor terms and conditions of service to the specific needs of particular customers).

[79] *See* BANM comments at 19 (citing Private Line Rate Structure and Volume Discount Practices, *Report and Order*, 97 FCC 2d 923, 947-49, ¶¶ 38-42 (1984)); *see also* Petitions for Waiver of Section 64.702 of the Commission's Rules, *Memorandum Opinion and Order*, 100 FCC 2d 1057, 1106 n.87 (1985) ("Indeed, there is an evolving policy . . . that flexibility in the pricing of private line services such as nondiscriminatory bulk discount offerings is desirable . . .").

[80] *See* PCIA Petition at 24-26.

[81] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Third Report and Order*, 9 FCC Rcd. 7988, 7996, ¶ 13 (1994). We note that PCIA requests in its Petition that the Commission forbear from enforcing sections 201 and 202 solely with regard to broadband PCS providers. PCIA Petition at 18. For the reasons discussed in the text, we conclude that such forbearance is unwarranted without regard to considerations of regulatory symmetry. If we believed the standards for forbearance were otherwise satisfied, we would consider whether the record supported forbearance for a broader category of CMRS providers. *See* para. 73, *infra*.

unreasonable carrier practices.[82] We believe that since the courts lack the Commission's expertise, developed over decades, in evaluating carriers' practices, carriers would face inconsistent court decisions and incur unnecessary costs.[83] This could result in consumers receiving differing levels of service and protection depending upon the jurisdiction in which they live, contrary to the intent of Congress in amending section 332(c).[84]

31. In sum, we find that the record does not permit us, consistent with the three-prong test set out in section 10 of the Act, to forbear from enforcing sections 201 and 202 with respect to broadband PCS providers. First, the record does not show that existing competition in the market in which broadband PCS providers compete has rendered sections 201 and 202 unnecessary to prevent unjust, unreasonable, and unjustly or unreasonably discriminatory practices. Second, the record does not show that sections 201 and 202 are no longer necessary to protect consumers from discriminatory charges and practices by broadband PCS providers. Finally, we do not believe that forbearance from enforcing sections 201 and 202 is consistent with the public interest. The Commission has, pursuant to its authority under section 332(c)(1)(A), forborne from the application of sections 203, 204, 205, 211, 212 and 214 of Title II of the Communications Act to any service classified as CMRS, including broadband PCS.[85] Sections 201 and 202 continue to provide important safeguards to consumers of broadband PCS against carrier abuse in an area that has already been largely deregulated by the Commission. We therefore find that at this time it is necessary to maintain sections 201 and 202, which enable the Commission to ensure that broadband PCS carriers provide service in a just, reasonable, and non-discriminatory manner, and to provide all consumers, including other carriers, with a mechanism through which they can seek redress for unreasonable carrier practices.

B. Resale Rule, 47 C.F.R. § 20.12(b)

32. Background. PCIA has also requested that we forbear from applying the CMRS resale rule to broadband PCS carriers.[86] On June 12, 1996, the Commission adopted a rule prohibiting certain providers of CMRS from unreasonably restricting the resale of their services during a

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[82] Resort to the courts would probably be required because state regulatory commissions would be limited in their ability to fulfill this function. Section 10(e) of the Act prevents state commissions from enforcing any provision of the Act that the Commission has forborne from applying. 47 U.S.C. § 160(e). In addition, under section 332(c)(3), states cannot regulate the entry of CMRS providers under any circumstances and cannot regulate CMRS rates unless the Commission grants a state's petition upon finding that market conditions fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory, or that such market conditions exist and a service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state. States may, however, regulate the other terms and conditions of CMRS. 47 U.S.C. § 332(c)(3).

[83] *See* BANM Comments at 17-18; GTE Comments at 5.

[84] *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. at 260 (1993) (section 332(c) is intended "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure").

[85] *CMRS Second Report and Order*, 9 FCC Rcd. at 1478-81, 1485, 1510-11, ¶¶ 173-182, 196, 272.

[86] PCIA Petition at 27-37.

transitional period.[87] Prior to 1996, the Commission applied a similar rule only to providers of cellular service.[88] In the *First Report and Order*, the Commission extended the resale rule to providers of broadband PCS and certain "covered" specialized mobile radio (SMR) services in order to promote competition in those services.[89] The Commission found that resale confers important public benefits in less competitive markets, including encouraging competitive pricing; discouraging unjust, unreasonable, and unreasonably discriminatory practices; reducing the need for regulatory intervention and concomitant market distortions; promoting innovation; improving carrier management and marketing; generating increased research and development; and positively affecting the growth of the market.[90] Balancing these benefits against the costs of regulation with respect to each class of providers, the Commission concluded that the rule's potential benefits as applied to cellular, broadband PCS and covered SMR providers exceeded its potential costs.[91] By contrast, because other CMRS providers did not substantially compete in the mass market for two-way switched voice and data services, faced vigorous competition, and operated in markets in which resale was an established practice, the Commission concluded that an express resale requirement was unnecessary for providers of these services.[92] Furthermore, the Commission found that the competitive development of broadband PCS and covered SMR services, as alternatives to cellular, would obviate the need for an

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[87] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *First Report and Order*, 11 FCC Rcd. 18455 (1996) (*First Report and Order*), *recon. pending, appeal pending sub nom. Cellnet Communications, Inc. v. FCC*, No. 96-4022 (6th Cir. filed Sept. 19, 1996). The Commission is currently considering petitions for reconsideration or clarification of this order, and these petitions raise many of the same general issues as PCIA does in its petition for forbearance. To the extent that parties raise in their comments in this proceeding issues other than forbearance that are the subject of petitions for reconsideration of the *First Report and Order*, we defer those issues to the reconsideration proceeding, in which a fuller record has been developed. *See, e.g.*, AT&T Comments at 5-6 (urging Commission not to apply the resale rule to bundled packages of services and equipment); GTE Comments at 7 n.10. We also note that while PCIA and others are encouraging us to forbear from enforcing the resale regulation, other parties request that we eliminate the sunset provision and maintain the resale rule in perpetuity. Our decision herein is not meant to prejudge the disposition of issues raised on reconsideration. We are committed to resolving these issues expeditiously.

[88] *See* 47 C.F.R. § 22.901(e) (1995). The prior rule included an exception permitting a cellular carrier to deny resale capacity to a fully operational facilities-based competitor, defined as a carrier whose five-year buildout period had expired. *Id. See generally First Report and Order*, 11 FCC Rcd. at 18457-58, ¶¶ 4-5.

[89] *First Report and Order*, 11 FCC Rcd. at 18459-62, ¶¶ 7, 10-12.

[90] *Id.* at 18461-62, ¶ 10. We note especially that resale in telecommunications markets has helped bring service to smaller and underserved markets, as well as providing opportunities for small businesses. In wireless markets, in particular, resale allows companies that may not have access to spectrum to offer full packages of services and products.

[91] *Id.* at 18464-67, ¶¶ 15-20.

[92] *Id.* at 18467-68, ¶ 21.

express CMRS resale requirement, and it therefore provided that the resale rule would sunset five years following the award of the last group of initial broadband PCS licenses.[93]

33. Section 20.12(b) of the Commission's rules, which we adopted in the *First Report and Order*, states that "[e]ach carrier subject to this section must permit unrestricted resale of its service" until the transition period expires.[94] We explained in the *First Report and Order* that the rule has two straightforward requirements: (1) no provider may offer like communications services to resellers at less favorable prices, terms, or conditions than are available to other similarly situated customers, absent reasonable justification; and (2) no provider may explicitly ban resale or engage in practices that effectively restrict resale, unless those practices are justified as reasonable.[95] It essentially prohibits covered carriers from unreasonably discriminating against resellers. The resale rule does not require providers to structure their operations or offerings in any particular way, such as to promote resale, adopt wholesale/retail business structures, establish a margin for resellers, or guarantee resellers a profit.[96]

34. Discussion. PCIA argues that we should not wait until the end of the transition period established in the *First Report and Order* to sunset the CMRS resale rule, but rather should forbear from applying that rule to broadband PCS providers immediately.[97] Several commenters support PCIA's position, arguing that the Commission should either forbear from enforcing the resale rule or significantly relax the current requirements due to robust competition in CMRS markets.[98] We find that the record does not show that the three-pronged forbearance test set out in section 10 of the Act has been met.[99] We therefore decline to forbear from enforcing the resale rule with respect to broadband PCS providers at this time.

35. The Commission has a long history of encouraging resale and believes it has played an important role in the development of telecommunications markets in the past and may continue to play

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[93] *Id.* at 18468-69, ¶ 24. *See* 47 C.F.R. § 20.12(b) ("This paragraph shall cease to be effective five years after the last group of initial licenses for broadband PCS spectrum in the 1850-1910 and 1930-1990 MHz bands is awarded."). The commencement of the five-year sunset period will be announced by public notice. *See First Report and Order*, 11 FCC Rcd. at 18469, ¶ 24.

[94] *See* 47 C.F.R. § 20.12(b).

[95] *First Report and Order*, 11 FCC Rcd. at 18462-63, ¶ 12.

[96] *Id.* at 18462, ¶ 12.

[97] PCIA Petition at 27-29.

[98] *See* AT&T Comments at 4-5; BANM Comments at 9-10; BellSouth Comments at 10-11; Nextel Comments at 7; PrimeCo Comments at 3-4; SouthEast Comments at 2-3; Sprint/APC Comments at 1-5; AirTouch Reply Comments at 3-4; BellSouth Reply Comments at 2-3; US WEST Reply Comments at 2-5.

[99] *See* 47 U.S.C. § 160(a).

such a role in the future.[100] Resellers benefit the marketplace by focusing on residential and smaller business customers, giving them pricing and volume discounts and customer service that facilities-based carriers often make available only to larger customers.[101] Resellers also exert downward pressure on the rates charged by facilities based providers of CMRS through their ability to purchase wireless service at high-volume rates and pass those savings on to residential and small business customers. Low-volume consumers benefit from the reseller's lower rates. They also benefit from the reseller's ability to impose market discipline on the facilities-based provider, which can result in lower prices overall. Moreover, resale expands the opportunities for small businesses to participate in the communications marketplace by focusing on unserved or underserved market segments, such as individual consumers and small businesses in particular ethnic communities, that may not receive sufficient marketing attention from underlying CMRS licensees.[102] Resellers are able to offer their customers CMRS service packaged with a wide range of other services, including some obtained from other providers, thus enabling resellers to tailor service packages to meet each customer's particular mix of needs.[103] Furthermore, resale rules that promote the dissemination of benefits to unserved and underserved communities are directly pertinent to the overarching purpose of serving the needs of "all the people of the United States," as mandated in section 1 of the Communications Act.[104]

36. To some extent, PCIA's arguments for forbearance from enforcing the resale rule simply repeat its arguments with respect to sections 201 and 202; namely, that the criteria in section 10 are met because of the level of competition faced by broadband PCS providers and the growth of broadband PCS service.[105] We reject these general arguments for the reasons discussed above.[106] Specifically, we have already found that, notwithstanding many promising developments, the competitive development of the market in which broadband PCS providers operate is not yet complete. Moreover, although increased competition brings many benefits to consumers and eliminates the rationale for many regulations, we cannot assume that increased competition alone will protect consumers from unjust or discriminatory practices. Under these circumstances, the evidence does not establish that current market conditions will ensure that providers' practices are just, reasonable, and not unjustly or unreasonably discriminatory, and that consumers will not be harmed.

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[100] *See* Resale and Shared use of Common Carrier Services and Facilities, 60 FCC 2d 261, 263 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert.denied*, 439 U.S. 875 (1978). *See also* Resale and Shared Use of Common Carrier Domestic Public Switched Network services, 83 FCC 2d 167(1980); *recon. denied*, 86 FCC 2d 820 (1981).

[101] *See* NWRA comments at 10-13.

[102] *Id.*

[103] *Id.* at 10-14.

[104] *See* 47 U.S.C.§ 151, *see also* H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. at 104 (1996).

[105] *See* PCIA Petition at 29-34.

[106] *See* Section IV.A, *supra.*

37. In addition to these general contentions, PCIA also makes arguments specifically directed to the current necessity for a resale rule and whether application of that rule to broadband PCS providers serves the public interest. With respect to the first prong of the test, PCIA argues that the resale rule is unnecessary because, given the competitive state of the market, broadband PCS providers have no incentive to engage in unjust or unreasonable resale practices, or to unjustly or unreasonably discriminate against resellers. Indeed, PCIA states, in a competitive environment facilities-based operators have a natural incentive to promote distribution of their services through the use of resellers.[107] PCIA asserts that facilities-based operators are even more likely to rely on resellers where, as is the case with broadband PCS providers, they have extremely high spectrum acquisition and operating costs.[108]

38. As discussed in the *First Report and Order*, we agree that the operation of competitive market forces removes the opportunity and incentive for carriers to restrict resale in an anticompetitive manner. Thus, the benefits to be obtained through a resale rule generally diminish as markets become more competitive.[109] Indeed, this observation underlies the Commission's decision to impose a sunset period on the resale rule.[110] We are not convinced on the present record, however, that existing market conditions impose such discipline on broadband PCS providers, or on other providers subject to the CMRS resale rule. To the contrary, the record contains significant evidence suggesting that despite the current resale rule, abuses in the form of refusals to offer services for resale still exist.[111] For example, WorldCom cites an instance where a carrier's resale program did not include delivery of bills to the reseller, thus allegedly impeding any resale agreement.[112] Touch 1 indicates that it has been presented with reseller rates so complicated that it would be almost impossible to craft a consumer rate plan based on them or to administer such rates in its own billing system, and that such tactics allow facilities-based carriers to be the first to market promotions and rates to attract the existing base of cellular customers.[113] In addition, two surveys submitted by NWRA and TRA suggest that resellers may be encountering significant difficulties in their negotiations with broadband PCS, cellular and SMR carriers.[114] While we cannot conclude from this record that all of these alleged practices are

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[107] PCIA Petition at 31.

[108] *Id.* at 31-32.

[109] *First Report and Order,* 11 FCC Rcd. at 18463, ¶ 14; *see also id.* at 18462, ¶ 11 ("the benefits to be obtained from a resale rule . . . are most prominent in markets that have not achieved full competition").

[110] *Id.* at 18468-69, ¶ 24.

[111] *See, e.g.,* NWRA Comments at 19-21; One Source Comments at 7-9; WorldCom Comments at 12-13.

[112] WorldCom Comments at 13.

[113] Touch 1 Reply Comments at 1-2.

[114] NWRA attached to its comments a survey dated July 1997 that it sent to 91 resellers. Of the 46 wireless resellers responding to the survey, 61 percent report that they have been unable to obtain resale arrangements with broadband PCS carriers within the past year. NWRA Comments at 4, 19, Attachment at 10. Subsequently, TRA submitted a survey conducted in January and February 1998 indicating that 88.3% of the respondents that were interested in reselling PCS had not successfully made arrangements to do so. Letter from Ernest R. Kelly, III,

unreasonable, these allegations, which have not been effectively refuted,[115] support our conclusion that the resale rule has not been shown unnecessary to ensure that rates and practices are just, reasonable, and non-discriminatory.[116] We note that although the Commission has received few formal complaints about CMRS providers' failure to permit unrestricted resale of their services,[117] we will vigorously investigate any complaints that we receive and take appropriate enforcement action.[118]

39. We also find that PCIA's petition does not satisfy the second prong of the forbearance test. PCIA argues that the resale rule is not necessary to protect consumers because the competitive marketplace will ensure the efficient availability of resale, with its attendant consumer benefits.[119] We reject this contention because, as we have discussed, the record does not show that current market conditions can effectively prevent unreasonable resale practices.[120] In this regard, we emphasize that unrestricted resale promises many benefits to consumers, especially in markets where direct competition among underlying providers remains somewhat limited. With more retail competitors, consumers benefit from alternative choices and higher quality services as carriers vie for customers. As many commenters note, the unrestricted availability of resale helps ensure that consumers will have

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President, TRA, to William Kennard, Chairman, FCC, dated Feb. 10, 1998, at 1, Attachment at 3; *see also* Letter from Ernest B. Kelly, III, President, TRA, to William Kennard, Chairman, FCC, dated March 24, 1998, Attachment A (March 24, 1998 TRA Letter).

[115] PCIA asserts that the TRA survey results do not preclude the possibility that carriers are not offering resale agreements for legitimate reasons contemplated by the resale rule, or that they are simply not offering specially favorable arrangements for resellers. Letter from Jay Kitchen, President, PCIA, to William E. Kennard, Chairman, FCC, dated March 11, 1998, at 1-2. NWRA argues, however, that not offering a resale agreement is tantamount to refusing a request for resale. March 24, 1998 TRA Letter at 1-2; *see also id.*, Attachment A (addressing PCIA allegations that NWRA survey results are internally inconsistent and statistically do not support TRA's claims).

[116] *See* 47 U.S.C. § 160(a)(1).

[117] *See Discount Business Services, Inc. v. Ameritech Mobile Phone Service of Chicago*, File No. WB/ENF-F-97-010 (filed Mar. 28, 1997) (alleging carrier denied reseller of prepaid service timely access to billing and usage information); *National Wireless Resellers Association v. AirTouch Cellular*, File No. WB/ENF-F-97-012 (filed June 3, 1997) (alleging defendant improperly offers lower rates to resellers that primarily use its services); *Cellexis International, Inc. v. Bell Atlantic NYNEX Mobile, Inc.*, File Nos. WB/ENF-F-97-001, *et al.* (filed Dec. 20, 1996) (alleging defendants improperly attempted to terminate agreement with switch-based reseller); *Cellnet Communications, Inc. v. New Par, Inc.*, File No. WB/ENF-F-ENF-95-010 (filed Feb. 16, 1995) (alleging improper denial of agreement with switch-based reseller); *Nationwide Cellular Service, Inc. v. Comcast Cellular Communications, Inc.*, File No. WB/ENF-F-ENF-95-011 (filed Feb. 16, 1995) (similar).

[118] *See* Letter from Gary P. Schonman, Chief, Compliance and Litigation Branch, Enforcement and Consumer Protection Division, Wireless Telecommunications Bureau, to Robert S. Foosaner, Vice President and Chief Regulatory Officer, Nextel Communications, Inc., File No. WB/ENF-I-98-1132 (May 29, 1998) (commencing inquiry under section 308(b) of the Act into possible violations of the resale rule by Nextel).

[119] PCIA Petition at 34-36.

[120] *See* para. 39, *supra*.

access to favorable rates and innovative service offerings.[121] For example, Cellnet argues that wireless resellers' ability to buy in bulk from facilities-based carriers allows individual consumers to obtain the same rate as a Fortune 500 company.[122] WorldCom argues that resellers compete in areas such as product design, customer support, billing detail, and pricing, thereby providing to consumers a broader range of service offerings tailored to the needs of different users.[123] In addition, resale allows providers of other telecommunications services that may not have CMRS licenses to offer bundled packages of services, including CMRS, for the benefit of consumers who prefer "one stop shopping."[124]

40. In addition to finding that the first two prongs of the forbearance test are not satisfied, we conclude that the record does not show forbearance from enforcement of the resale rule to be in the public interest. In particular, we find that continued enforcement of the resale rule is important to promote the rapid development of vigorous competition in the market in which broadband PCS providers compete.[125] One of our major reasons for adopting the CMRS resale rule in 1996 was to speed the development of competition in the mass market for two-way switched mobile voice services by permitting new entrants to begin offering service to the public before building out their facilities.[126] This capability, we reasoned, would help new entrants to overcome the advantages enjoyed by two types of earlier entrants. First, all new entrants, including broadband PCS providers, would be competing directly with cellular firms that in many instances had been in the market for a decade or more, and therefore enjoyed substantial advantages of incumbency.[127] Second, we observed that even among broadband PCS providers, the earliest licensed entrant in a geographic market might receive its license and begin operating substantially before its last competitors.[128] In this regard, we note that the A and B block licensees in some areas will have a licensing headstart of three years or more over some of their competitors.[129] We continue to believe that resale opportunities will help later entrants

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[121] *See* America One Comments at 5-10; Cellnet Comments at 5-7; CompTel Comments at 1-6; MCI Comments at 3-4; NWRA Comments at 11-16; TRA Comments at 2-4; WorldCom Comments at 3-10; NWRA Reply Comments at 1-4; TRA Reply Comments at 6; Touch 1 Reply Comments at 1-2.

[122] Cellnet Comments at 7; *see also* WorldCom Comments at 8.

[123] WorldCom Comments at 9.

[124] *See* NWRA Comments at 3; WorldCom Comments at 4, 9, and Attachment A (Affidavit of James Wolfinger) at 2.

[125] *See* 47 U.S.C. § 160(b) (directing the Commission to consider whether forbearance will promote competitive market conditions as part of its public interest analysis).

[126] *See First Report and Order*, 11 FCC Rcd. at 18462, ¶ 10; *see also id.* at 18470, ¶ 27.

[127] *Id.* at 18465, ¶ 17.

[128] *Id.* at 18465-66, ¶ 18.

[129] The earliest broadband PCS licenses were awarded to three holders of pioneer's preferences on December 13, 1994, and the remaining A and B block licenses were awarded on June 23, 1995. In some geographic areas, at least one of the remaining licenses still has not been awarded.

to overcome their competitors' advantages by entering the market through resale before their facilities are built out, and we find nothing in the record to contradict this conclusion.[130]

41. The resale rule also promotes competition in ways other than facilitating the early entry of new licensees. In a market that has not achieved sufficient competition, an active resale market can help to replicate many of the features of competition, including spurring innovation and discouraging unreasonably discriminatory practices, by increasing the number of entities offering service at the retail level.[131] In addition, the availability of resale permits more entities to offer packages containing a variety of services including CMRS, thereby increasing competition in the market for multiple-service packages.[132] Resale may also be used as an entry strategy by small entities that may aspire to offer facilities-based services in the future.

42. In opposition to these procompetitive public interest benefits, PCIA argues that the CMRS resale rule harms the public interest by imposing costs of compliance on broadband PCS providers.[133] While PCIA makes no attempt to quantify these costs, we did acknowledge in the *First Report and Order* that, as with all regulation, there are costs associated with resale compliance which should not be imposed unless clearly warranted.[134] We concluded, however, that as applied to cellular, broadband PCS, and covered SMR providers, these costs were outweighed by the benefits of the resale rule.[135] Nothing in the present record persuades us to reevaluate this conclusion. As we have noted, the resale rule only proscribes policies that restrict resale or discriminate against resellers without reasonable justification, and does not require carriers affirmatively to structure their businesses to promote resale.[136] Moreover, we previously determined to sunset the resale rule five years after we award the last group of initial licenses for currently allocated broadband PCS spectrum.[137] In light of these limitations, and in the absence of specific evidence to the contrary, we cannot conclude that the administrative costs imposed by the resale rule outweigh the benefits of the rule. In addition, we are not persuaded that the obligation to permit resale significantly discourages facilities-based carriers from innovating in a market that has not achieved sufficient competition.[138] As we observed in the *First Report and Order*, the resale rule does not prevent a provider from recovering its costs incurred in

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[130] *See* WorldCom Comments at 8-9 (noting value of resale to new entrants).

[131] *See First Report and Order*, 11 FCC Rcd. at 18462, ¶ 11.

[132] *See* NWRA Comments at 8; WorldCom Comments at 7-9.

[133] PCIA Petition at 36-37.

[134] *First Report and Order*, 11 FCC Rcd. at 18463, ¶ 14.

[135] *See id.* at 18464-67, ¶¶ 15-20.

[136] *Id.* at 18462, ¶ 12. *Compare* 47 U.S.C. § 251(c)(4)(A) (requiring incumbent local exchange carriers to offer services for resale at wholesale rates).

[137] *See* 47 C.F.R. § 20.12(b).

[138] *See* PCIA Petition at 34.

providing a service, including the costs of developing any underlying technology, or from inserting in its sales agreements appropriate, non-discriminatory terms to protect its interests.[139] Under these circumstances, it is not clear how the rule would operate as a disincentive to innovation.

43. Furthermore, even assuming that forbearance from enforcing the resale rule would confer certain public interest benefits, forbearance would also impose costs. If we were to forbear from enforcing the rule only as applied to broadband PCS providers, we would create a regulatory asymmetry between those providers and their cellular and covered SMR competitors. As discussed above, this result could distort the working of market forces, and contradict clear Congressional intent.[140] If, however, we were to forbear with respect to all CMRS providers, we would further exacerbate the competitive advantage enjoyed by the cellular incumbents.

44. In sum, the record does not show that the three statutory conditions for forbearance from enforcement of the resale rule are satisfied. We therefore conclude at this time that we should continue enforcing the resale rule against all covered providers until the scheduled sunset date five years after we award the last group of initial broadband PCS licenses.[141] We recognize, however, that market conditions or other developments may justify termination of the resale rule, as applied to some or all covered providers, before that time. In particular, conditions in some geographic markets may support forbearance at the same time as the rule is still needed in other locations.[142] In evaluating future petitions, we will consider the state of facilities-based competition, the extent of resale activity within the relevant market, the immediate prospects for future development of additional facilities-based competition, the value of service to previously unserved or underserved markets, and other factors relevant to determining whether the requirements of section 10 would be satisfied by the granting of such a petition.[143] In order to resolve such petitions in an expeditious fashion, we will place those petitions promptly on public notice and we will establish expedited pleading cycles. We will make every effort to resolve such petitions substantially in advance of the statutory deadline for forbearance petitions.

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[139] *First Report and Order*, 11 FCC Rcd. at 18472, ¶ 32.

[140] *See* para. 32, *supra.*

[141] We note that our decision to sunset the resale rule has been challenged both in petitions for reconsideration and in a judicial appeal. *See* n. 87, *supra.* Nothing in this Order is intended to foreclose our reconsideration of the sunset decision.

[142] *See* 47 U.S.C. § 160(a) (Commission may exercise forbearance "in any or some . . . geographic markets").

[143] While not exhaustive, we believe consideration of these factors will provide a more comprehensive view of conditions within a given geographic market than focusing on a single factor, such as the number of competitors. In this sense, we disagree with our dissenting colleagues, Commissioners Powell and Furchtgott-Roth, that other indicia of market conditions are not needed. We believe it would be an abdication of our responsibility under section 10 to ignore information indicative of whether the three prongs of the section 10 forbearance standard, including the prongs mandating consideration of consumer protection issues and the public interest, is met for a particular market.

C. International Section 214 Authorizations

45. PCIA asks us to forbear from the international section 214 facilities authorization requirement as it applies to broadband PCS providers. Pursuant to section 214, we require carriers to obtain separate Commission authorizations to provide international telecommunications service, whether by acquiring facilities or by reselling the international services of another carrier. International section 214 authorizations are filed according to section 63.18 of the Commission's rules and processed pursuant to section 63.12.

46. In the *CMRS Second Report and Order*, we exercised the authority granted to the Commission under section 332(c) to forbear from applying section 214 requirements to CMRS providers in the domestic context.[144] We declined at that time to consider forbearing from application of section 214 to CMRS providers' international services.[145] Thus, all CMRS providers are currently required to obtain section 214 authorization before providing international service.

47. PCIA argues that the section 214 authorization requirement is unnecessary because of the highly competitive market conditions in the wireless industry. According to PCIA, broadband PCS providers offering international message telephone service (IMTS) as facilities-based carriers lack any incentive to act in an anticompetitive manner because they are new entrants that lack control of bottleneck facilities.[146] For broadband PCS providers offering IMTS through resale, PCIA argues, the case for forbearance is even stronger because the Commission has determined that U.S. international resellers pose no anticompetitive concerns.[147] Thus, PCIA argues, the section 214 authorization requirement is unnecessary to ensure just, reasonable, and nondiscriminatory rates or to protect consumers. Forbearance would serve the public interest, PCIA claims, by reducing the regulatory delay and costs associated with the application process. The delay while an application is being processed is unnecessary, PCIA argues, because there is little opportunity for broadband PCS providers to engage in anticompetitive conduct.[148]

48. For the reasons discussed below, we find that it is necessary to continue to require that international services be provided only pursuant to an authorization that can be conditioned or revoked. We therefore conclude, based on the record generated in this proceeding, that the section 10 forbearance standard for the international section 214 authorization requirement has not been satisfied. As part of our 1998 biennial review, however, we are considering what steps can be taken to minimize regulatory burdens on international carriers, including PCS providers. We believe that at the conclusion of this review, many of PCIA's concerns with the section 214 authorization process will have been addressed.

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[144] *CMRS Second Report and Order*, 9 FCC Rcd. at 1480-81, ¶ 182.

[145] *See id.* at 1481 n.369; 47 C.F.R. § 20.15(d).

[146] PCIA Petition at 52-53.

[147] *Id.* at 53-54 (citing Regulation of International Common Carrier Services, *Report and Order*, 7 FCC Rcd. 7331, 7335, ¶¶ 31-32 (1992) (*International Services*)).

[148] PCIA Petition at 56-58.